CORD
AND
IEFS

Nos. 16-1436, 16-1540

FILED
SEP 18 2017
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

DONALD J. TRUMP, ET AL., *petitioners*

v.

INTERNATIONAL REFUGEE ASSISTANCE PROJECT, ET AL., *respondents*

DONALD J. TRUMP, ET AL., *petitioners*

v.

STATE OF HAWAII, ET AL., *respondents*

On Writs of Certiorari to the United States Courts of Appeals for the Fourth and Ninth Circuits

BRIEF OF SOCIAL SCIENCE SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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INTEREST OF *AMICI CURIAE*

Amici curiae are social scientists at leading universities in the United States who specialize in the study of Islam and Muslims in the United States and Europe. Collectively, amici have spent decades studying the way in which Islam manifests, and the ways in which it is received in the United States and Europe.[1]

Amici have published their findings concerning the reception of Islam and Muslims in the United States and Europe in leading peer-reviewed scholarly journals and leading academic presses, including Harvard and Princeton. Their research entails a study of the manner in which negative attitudes toward Muslims are expressed and reproduced. Amici respectfully submit this brief to draw the Court's attention to terminology used in the executive orders relevant to this litigation.

Amici are listed below. Their institutional affiliations are included for informational purposes only.

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[1] No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No one other than *amici curiae* or *amici*'s counsel made a monetary contribution to the preparation or submission of this brief. Letters from the parties consenting to the filing of this brief have been filed with the Clerk of the Court.

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SUMMARY OF THE ARGUMENT

The two Executive Orders giving rise to this litigation both contain on their face an inexplicable reference that reveals an invidious anti-Muslim intent. Executive Orders 13679 (EO-1) and 13780 (EO-2) both discuss "honor killings"—the homicide of a family member, typically female, due to the perpetrator's belief that the victim has shamed the family, usually by violating a religious tenet. The first Executive Order states an intent to prohibit "those who engage in acts of bigotry or hatred . . . including 'honor' killings." *Protecting the Nation From Foreign Terrorist Entry Into the United States* § 1, 82 Fed. Reg. 8977 (Jan. 27, 2017). Both the first and the second Executive Orders compel the Director

of Homeland Security to collect information regarding "honor killings" perpetrated by foreign nationals. *Id.* § 10(iii); *Protecting the Nation From Foreign Terrorist Entry Into the United States* § 11, 82 Fed. Reg. 13,209 (Mar. 6, 2017).

These references seem, at first blush, incongruous with the purported objective to protect U.S. national security. The practice of "honor killings" has never been tied to international terrorism. There is no known association between "honor killings" and the six countries at issue in this case—Iran, Libya, Somalia, Sudan, Syria or Yemen. Nor is there any connection between the incidence of "honor killings" and the likelihood that a government of one of those nations will supply information requested by U.S. immigration authorities.

This begs the question: why do the texts of two emergency measures intended to "Protect[] the Nation From Foreign Terrorist Entry" invoke the unrelated phenomenon of honor killings?

These references make sense only when viewed in context. The term "honor killings" is used in current political discourse as a coded message that invokes and reinforces animus against one religious group—Muslims—by painting them as violent and uncivilized. The term is routinely invoked in discriminatory invective as a way to stigmatize Muslims. Expressions of concern about "honor killings," in the present political context, are therefore not neutral references to all gender-based violence. They are a means of affirming and propagating anti-Muslim stereotypes.

A contextual understanding of the term "honor killings" bears on a central premise of the government's submission to this Court. The government contends that EO-2 is supported by a "facially legitimate and bona fide reason." Pet. Br. 21; *id.* at 62, 65 (same). The government therefore urges this Court to hold that no further review is permitted or warranted. *Id.* at 21, 68.

The government's premise is false. As explained below, an expression of prejudicial motive is explicitly, if subtly, included in the text of the Orders. Neither EO-1 nor EO-2 is "neutral" on its face. References to honor killings are intended to conjure up negative associations with Muslims as a class. The context, implementation, and consequences of EO-1 and EO-2 reinforce the conclusion that references to "honor killings" can be understood only as a reflection of animus. Governmental action that rests on such biases is antithetical to our Constitutional tradition.

To be sure, our Nation has not always lived up to its promise of nondiscrimination on the basis of religion, race, and ethnicity. Those wishing to invoke malicious stereotypes have long used so-called 'dog whistles' in political discourse. African-Americans, for example, understand the discriminatory subtext when officials fret publicly about 'ghetto thugs' and 'violence in our inner cities.' Jews are attuned to warnings of 'rootless cosmopolitans' and 'international financiers.' So, too, Muslims know that references to 'honor killings' are designed to propagate misleading stereotypes of a primitive and violent culture. The use of such coded epithets is deplorable in any context. Enshrining a negative stereotype of a religious minority in the text of an

official federal directive, however, raises grave constitutional concerns.

Amici agree with respondents that it is necessary and appropriate to look beyond the face of EO-2 to evaluate its legality. But even assuming *arguendo* (a) that the Order's validity is measured by its text alone, or (b) that consideration of additional indicia requires a prima facie showing of illegitimate intent, EO-2 contains on its face evidence of a discriminatory motive inconsistent with the Establishment Clause of the First Amendment.

ARGUMENT

I. This Court regularly parses the text of government orders for evidence of unconstitutional animus.

The Constitution prohibits the government from acting on the basis of hostility toward, or negative stereotypes about, a disadvantaged or unpopular class of persons. In particular, the Establishment Clause "forbids" state action based on "an official purpose to disapprove of a particular religion." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993); *Epperson v. Arkansas*, 393 U.S. 97, 103–04 (1968). This Court has not hesitated to strike down a law because of its "capacity—indeed, its express design—to burden or favor selected religious denominations." *Larson v. Valente*, 456 U.S. 228, 255 (1982). A taint of hostility toward a faith or its members can mark the difference between lawful and unconstitutional government action. *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1831 (2014) (Alito, J., concurring); *accord Locke v. Davey*, 540 U.S. 712, 725 n.10 (2004).

Animus need not be articulated *in haec verba* to be recognized in the text of a government order or enactment. Constitutional violations can manifest in either "obvious" or "subtle" forms. *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015). In *Lukumi Babalu*, for example, the Court considered a Florida city's ordinance that seemed facially neutral but in fact was motivated by hostility toward the Santeria faith. 508 U.S. at 528, 534. The Court looked first to the text of the ordinance and, notwithstanding the fact that it did not reference Santeria, honed in on the presence of "words with strong religious connotations" in the ordinance's text—specifically "sacrifice" and "ritual"—as "consistent with the claim of facial discrimination." *Id.* at 534.

The fact that a law references particular groups can also be powerful evidence that it rests upon an unconstitutional motive. In *Loving v. Virginia*, for example, the Court saw past the state's justifications for its anti-miscegenation law by observing that Virginia's law on its face prohibited "only interracial marriages involving white persons," which "demonstrates that the racial classifications must stand on their own justification, as measures designed to maintain White Supremacy." 388 U.S. 1, 11 (1967). Likewise, when a legal text contains a classification that bears no plausible relation to the putative objective of a measure, it "raise[s] the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected." *Lawrence v. Texas*, 539 U.S. 558, 583 (2003) (O'Connor, J., concurring) (internal quotation marks omitted); *see also Romer v. Evans*, 517 U.S. 620, 632 (1996) (finding the impact of the law was "so

discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects").

The Court has not hesitated to find impermissible intent even where it is veiled or coded. *Lukumi Babalu*, 508 U.S. at 534 ("The Free Exercise Clause protects against governmental hostility which is masked, as well as overt."). For example, in *Mitchell v. Helms*, the Court observed that "hostility to aid to pervasively sectarian schools has a shameful pedigree that we do not hesitate to disavow." 530 U.S. 793, 828 (2000). Tellingly, the traditional prohibitions on such aid were not framed in terms of explicit anti-Catholic bias. Rather, at the time prohibitions on such aid were first installed, "it was an open secret that 'sectarian' was code for 'Catholic.'" *Id.* at 829. Similarly, in *City of Chicago v. Morales*, the Court declined to credit the existence of prior anti-loitering laws as evidence that there was no fundamental right to loiter because such laws had been "used after the Civil War to keep former slaves in a state of quasi slavery." 527 U.S. 41, 53 n.20 (1999).

In *United States v. Windsor*, the Court looked to the title of a law to "confirm" its impermissible purpose. 133 S. Ct. 2675, 2693 (2013). The title—on the "Defense of Marriage"—did not itself directly bespeak an improper motive. But just as the *Mitchell* Court situated the term "sectarian" in historical context, so the Court in *Windsor* interpreted the "Defense of Marriage" in the prevailing political climate to infer an unlawful purpose. "In law as in life, . . . the same words, placed in different contexts, sometimes mean different things." *Yates v. United States*, 135 S. Ct. 1074, 1082 (2015).

Of course, other forms of evidence, including historical context, the process of enactment, and the consequences of a law, are also useful to assessing the constitutionality of the motives that undergird governmental action. *See, e.g.*, *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973) (finding that law was based on impermissible animus against "hippies" in part based on consideration of legislative history); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985) (finding that the denial of a special use permit to group home for persons with mental disabilities was motivated by "irrational prejudice" in part based on statements made at hearings about the permit); *Windsor*, 133 S. Ct. at 2693 (evaluating the "history of DOMA's enactment"). Extrinsic evidence of bias in the promulgation of EO-1 and EO-2 abounds here. *See* JA 219–20.

Amici agree with the Respondents that the Court can and should look beyond the four corners of EO-2 to evaluate its constitutionality. The Court has done so to ascertain the constitutionality of immigration measures many times before. *See, e.g.*, *INS v. Pangilinan*, 486 U.S. 875, 886 (1988) (looking to the "historical record" to determine whether U.S. government officials' decisions to temporarily suspend naturalizations in the Philippines after World War II were "motivated by any racial animus"); *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1690–92 (2017) (applying heightened scrutiny to gender-based provision in immigration law, noting that "history reveals what lurks behind § 1409" and reviewing at length its legislative history, including statements made at hearings on the law).

But the Court need not venture beyond the text of EO-2 to find evidence of an improper motive. Here, such evidence is found in the Order's incongruous "honor killings" provision, as we explain below. Thus, even if the Court decides that it is required as an initial matter to cabin its review to the text of EO-2, there is still sufficient evidence therein of an impermissible animus against a particular religion to compel strict judicial scrutiny. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019 (2017) (holding that the First Amendment "subjects to the strictest scrutiny laws that target the religious for 'special disabilities' based on their 'religious status'"). At a minimum, this evidence requires more searching review than the "minimal scrutiny (rational basis review)" proposed by the government. Pet. Br. 63; *Lawrence*, 539 U.S. at 580.

II. Evidence of anti-Muslim animus is present on the face of the Executive Order.

The text of EO-2 contains evidence of an impermissible animus. EO-2, like its precursor EO-1, makes an otherwise inexplicable reference to "honor killings." EO-2 § 11(a)(iii); EO-1 §§ 1, 10(iii). This term is akin to the word "sectarian" in *Mitchell v. Helms*: it is a veiled reference intended to invoke association with a particular religious minority. It is what is colloquially known as a "dog whistle."

EO-2's words thus reveal that the government's action is not "facially legitimate and bona fide." *Kleindienst v. Mandel*, 408 U.S. 753, 770 (1972). Even under the government's view of *Mandel*, this Court may therefore consider both the available evidence of improper motivation and the absence of a legitimate

national security justification in assessing the constitutionality of EO-2.

A. The term "honor killings" conveys a negative stereotype of Muslims as violent and uncivilized.

EO-1 and EO-2 each invoke the concept of "honor killings." EO-1 identifies a supposed risk of "honor killings" among the motivations for the President's action. EO-1 § 1. It requires that the Secretary of Homeland Security collect data, *inter alia*, on "'honor killings' in the United States by foreign nationals." *Id.* § 10(iii). EO-2 reiterates this command. EO-2 § 11(a)(iii) (requiring that the Secretary of Homeland Security "collect and make publicly available . . . information regarding the number and types of acts of *gender-based violence against women, including so-called 'honor killings,'* in the United States by foreign nationals") (emphasis added).

The term "honor killing" is not neutral. It refers to the killing of a woman by her relatives for violation of a sexual code in the name of restoring family honor, and it is used almost exclusively to refer to such acts within Muslim families. LILA ABU-LUGHOD, DO MUSLIM WOMEN NEED SAVING? 113–14 (2013). It is deployed in this way despite the absence of any evidence of a causal relationship between religion and such violence. Accordingly, it serves as a code to imply Muslims' purported proclivity to violence.

The term "honor killing" has long been used to denigrate Islam as a violent and dangerous faith. KATHERINE PRATT EWING, STOLEN HONOR: STIGMATIZING MUSLIM MEN IN BERLIN 151–53 (2008) (describing how violence by men assumed to be

Muslim has been "retrospectively classified as honor killing" without regard to the evidence of actual motives).

For example, in 2008, an Egyptian-born taxi driver in Dallas, Texas, murdered his two daughters. Even though the father had a long history of sexually abusing his children, and even though there was no evidence that he was motivated by religion, commentators quickly labeled the murders "honor killings" and blamed them on "Islam." Leti Volpp, *Framing Cultural Difference: Immigrant Women and Discourses of Tradition*, 22 DIFFERENCES: J. OF FEMINIST CULTURAL STUD. 90, 90–91 (2011). Likewise, when a Muslim American woman was killed by her husband in Buffalo, New York, just after obtaining a restraining order against him based on past abuse, the media was quick to cite "experts" who categorized the crime as an honor killing because of "the fierce and gruesome nature of th[e] murder." Joshua Rhett Miller, *Beheading in New York Appears to be Honor Killing, Experts Say,* FOX NEWS (Feb. 17, 2009), https://goo.gl/8Tsmu3. Again, there was no evidence that the perpetrator was motivated by religion.

Similarly, high-profile murders of Muslim women by family members elsewhere are assigned the status of "honor killings" after the fact merely by dint of the assumed religious identity of the perpetrator. Ewing, *supra*, at 151–53. In this way, media treatment of "honor killing" in North America and Europe also "link honour killing to Islam . . . in ways that lead to the stigmatization of entire immigrant communities." Anna C. Korteweg & Gökçe Yurdakul, United Nations Research Institute for Social Development,

Religion, Culture and Politicization of Honour-Related Violence: A Critical Analysis of Media and Policy Debates in Western Europe and North America, at iii (Oct. 2010), https://goo.gl/YUC8p1.

More generally, news stories, reports, and political statements that link gender- and sexual-based violence to Islam assert a false and derogatory stereotype about Islam specifically. Discussing a sexual assault on a CBS reporter in Egypt, for example, the syndicated columnist Debbie Schlussel described Muslims as "animals" and described the assault as "what Islam is all about." ANNE NORTON, ON THE MUSLIM QUESTION 69 (2013).

Intrafamilial violence is shamefully pervasive across cultures and nations. K.M. Devries et al., *The Global Prevalence of Intimate Partner Violence Against Women*, 340 SCIENCE 1527, 1527 (2013) (estimating that 30 percent of women "aged 15 and over have experienced, during their lifetime, physical and/or sexual intimate partner violence"). While regional rates vary, the incidence of intrafamialial violence exceeds 19 percent everywhere in the world except east Asia. *Id.* at 1528. No culture, religion, or country has a monopoly on intrafamilial violence against women.

Moreover, to the extent the term is understood to isolate a specific subcategory of domestic violence, "[h]onor crimes are committed worldwide and . . . cu[t] across cultures and religions." Brittany E. Hayes et al., *An Exploratory Study of Honor Crimes in the United States*, 31 J. FAM. VIOLENCE 303, 304 (2016); Aisha Gill, *Honor Killings and the Quest for Justice in Black and Minority Ethnic Communities in the United Kingdom*, 20 CRIM. JUST. POL'Y REV. 475,

480 (2009) ("Honor killings cut across ethnic, class, and religious lines [and are committed] not only by Muslims but also by Druze, Christians, and occasionally Jews.").

Yet the term "honor killing" is used in current political discourse almost exclusively to refer to Muslims, and to thereby suggest that Muslims are distinctively violent and uncivilized. *See, e.g.*, Benjamin Weinthal, *Suspected 'Honor Killing' Stokes German Fears About Customs, Crimes of Middle Eastern Refugees*, FOX NEWS WORLD (Oct. 9, 2015), https://goo.gl/TH7EQq (linking honor killings to Islam); Chad Groening, *Ignoring Root of 'Honor Killings' Dangerous*, ONE NEWS NOW (Nov. 4, 2009), https://goo.gl/Bm6Uzy; *see also* ABU-LUGHOD, *supra*, at 114 (noting the "constant association" of honor killings stories with "the Middle East and South Asia, or immigrant communities originating in these regions, [which] has given them a special association with Islam"); *accord* SHERENE RAZACK, CASTING OUT: THE EVICTION OF MUSLIMS FROM WESTERN LAW AND POLITICS 128 (2008) (explaining how the same crime is labeled a crime of "passion" or of "honor" depending on the religious identity of the perpetrator in a way that "reifies Muslims as stuck in premodernity"); Inderpal Grewal, *Outsourcing Patriarchy: Feminist Encounters, Transnational Mediations and the Crime of 'Honour Killings,'* 15 INT'L FEMINIST J. POL. 1, 5 (2013).

Put differently, the term "honor killing" is a way of misleadingly categorizing violence against women as a Muslim problem. It is a way of "consolidating the stigmatization" of Muslim communities as deficient,

backward, and prone to violence. ABU-LUGHOD, *supra*, at 113.

Individuals and groups with anti-Muslim biases commonly invoke so-called "honor crimes" as a phenomenon that supposedly "divides civilized societies from uncivilized societies," *id.* at 115, notwithstanding the pervasive occurrence of intrafamilial violence against women across cultures, Devries, *supra*, at 1528. Anti-Muslim organizations and websites commonly depict Muslims as "inherently violent" and prone to "rape, sexual abuse against children, violent acts caused by a *culture of honour*, violence within arranged marriages, threats against public individuals and physical violence against non-Muslims." Mattias Ekman, *Online Islamophobia and the Politics of Fear: Manufacturing the Green Scare*, 38 ETHNIC & RACIAL STUD. 1986, 1995 (2015) (emphasis added).

But Muslim religious leaders have repeatedly and forcefully condemned violence against women. *See, e.g.*, Paola Loriggio, *Shafia Murders: Imams Issue Fatwa Against Honour Killings, Domestic Violence*, HUFFINGTON POST (Feb. 4, 2012), https://goo.gl/vyjdeE. Rather than condoning gender-based violence, "Islam and Islamic law . . . [over time] are coming to be invoked more and more *against* honor crimes." ABU-LUGHOD, *supra*, at 139 (emphasis added); Gill, *supra*, at 480 ("[B]oth Sharia law (Islamic law) and customary law alike have strict guidelines forbidding [honor killings]."). Where survey data of public attitudes to honor killing exist, they show no difference between Muslims' and non-Muslims' attitudes to such acts. *The Gallup Coexist*

Index 2009: A Global Study of Interfaith Relations 34 (2009), https://goo.gl/VXBqE9.

Coded stereotypes, however, have a long history in U.S. politics. Jim Crow was defended by "coded" appeals to white supremacy framed in terms of "African-Americans' illegitimate sexual relations and proclivity to crime." TALI MENDELBERG, THE RACE CARD: CAMPAIGN STRATEGY, IMPLICIT MESSAGING, AND THE NORM OF EQUALITY 94-95 (2001). Coded invocations of the same fears are still employed in current political discourse. Jon Hurwitz & Mark Peffley, *Playing the Race Card in the Post–Willie Horton Era: The Impact of Racialized Code Words on Support for Punitive Crime Policy*, 69 PUB. OPINION Q. 99 (2005) (demonstrating the racially loaded effect of crime-related language); *see also* RANDALL KENNEDY, INTERRACIAL INTIMACIES: SEX, MARRIAGE, IDENTITY, AND ADOPTION 520 (2003). Sadly, the use of "subtle" allusions to negative stereotypes has been shown to reap political rewards because dog whistles "activate racial attitudes" while maintaining a measure of deniability. Nicholas A. Valentino et al. *Cues That Matter: How Political Ads Prime Racial Attitudes During Campaigns*, 96 AM. POL. SCI. REV. 75, 75–76 (2002).

B. The reference to "honor killings" reveals a discriminatory intent behind EO-2.

EO-1 and EO-2's references to "honor killings," in short, are neither neutral nor superfluous. They are masked invocations of common negative stereotypes, *Lukumi Babalu*, 508 U.S. at 534, used to malign Muslims as violent and uncivilized. The continued inclusion of such a reference in EO-2, particularly in

combination with the absence of any relation between "honor killings" and terrorism or the countries that are the subject of the Order, severely undermines the government's claim that EO-2 is neutral on its face.

The context and structure of EO-2 confirm that its reference to "honor killing" is not neutral but rather reflects impermissible animus against Muslims.

First, references to honor killings are "so discontinuous with the reasons offered for" the measure, as to raise concern about animus. *Romer*, 517 U.S. at 632; *see also Windsor*, 133 S. Ct. at 2693 (noting that "[d]iscriminations of an unusual character" demand "careful consideration") (internal quotation marks omitted). The government defends EO-2 on the basis of national security. So-called "honor killings," while reprehensible, are not terrorism. They are also rare: the most careful study available identifies sixteen "honor crimes" in the United States between 1990 and 2014. Hayes et al., *supra*, at 303. Nor are they harbingers or proxies for terrorism, and the government does not contend otherwise. In fact, the government's brief offers no rationale whatsoever for the EOs' references to honor killings.

But the term was not included in the text by accident—and certainly not preserved from EO-1 and carried into EO-2 by chance. The only plausible rationale for invoking "honor killings" in the text of both Executive Orders was to trigger a negative association with Muslims. In particular, the use of the term in the text of both EO-1 and EO-2 invokes the very same negative stereotypes about Muslims that permeated the rhetoric surrounding the Orders' promulgation. JA 181–84 (collecting statements).

Hence, there is a direct link between EO-2's text and the surrounding evidence of animus that the government wishes to obscure.

Second, there is no relationship between "honor killings" and the specific countries covered by EO-2. EO-2 extensively quotes the 2015 State Department Country Reports on Terrorism to establish "some of the conditions in six of the previously designated countries that demonstrate why their nationals continue to present heightened risks to the security of the United States." EO-2 § 1(e). But the full State Department Reports for these six countries make no mention of "honor killings." *See* U.S. State Department Country Reports on Terrorism 2015 (June 2016), https://www.state.gov/documents/organization/258249.pdf (last visited Sept. 18, 2017). That makes sense: honor killings are unrelated to national security, terrorism, or the six countries targeted by the Order. The "discontinu[ity]" between the text and its effect is a cautionary flag this Court cannot ignore. *Romer*, 517 U.S. at 632.

Third, the reference to "honor killings" in EO-2 is a holdover from EO-1 that demonstrates a continuity of motivation between EO-1 and EO-2. EO-1 was riddled with additional evidence of anti-Muslim bias. For example, in provisions relating to refugee admissions, EO-1 created an express preference for adherents of "minority" religions in the selection of refugees. EO-1 § 5(b). As the President explained in contemporaneous statements, this provision was intended to favor Christian minorities from Muslim-majority countries. JA 1112. When the reference to "honor killings" is juxtaposed alongside an intentionally discriminatory provision in the same Order, such

as the Christian-minority exception, the term is explicable solely as an invocation of anti-Muslim animus.

* * *

Invidious and hateful stereotypes such as those reflected in the term "honor killings" have no place in a nation committed to the ideals and commands of the Establishment Clause. The government's use of this coded message in EO-2 is evidence of anti-Muslim bias that requires strict judicial scrutiny.

CONCLUSION

This Court should affirm the decision below.

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SEPTEMBER 18, 2017